

Our ref: FOI-2022-10056

29 July 2022

Marek Not Given

Emailed to: [foi+request-8939-b549c2fc@righttoknow.org.au](mailto:foi+request-8939-b549c2fc@righttoknow.org.au)

Dear Marek

**Freedom of Information request – Internal Review decision**

I am writing to advise you of my decision following your request for internal review of Ms Sine Delitt's decision to refuse access to documents you requested under the *Freedom of Information Act 1982* (FOI Act).

I am authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

**Summary**

On 23 May 2022, you requested access to the following:

*'... access to any and all documents HELD BY THE OFFICE OF THE COMMONWEALTH OMBUDSMAN which set out the following:*

*in relation to the Australian Public Service Commission (APSC), statements of the following for the 2019-2020 and 2020-2021 financial years:*

- (i) the number of public interest disclosures received by authorised officers of the APSC during the financial year;*
- (ii) the kinds of disclosable conduct to which those disclosures relate;*
- (iii) the number of disclosure investigations that the principal officer (or his delegate/s) of the agency conducted during the financial year;*
- (iv) the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations ...'.*

You were advised on 22 June 2022 of the decision to refuse access to the documents you requested, which relate to APSC public interest disclosure (PID) information.

Ms Delitt refused access under s 37(1)(b) of the FOI Act which is an exemption which applies to documents which would, or could reasonably be expected to 'disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law'. Ms Delitt also decided not to provide information about the number of documents considered, nor a schedule of the documents, as she considered that doing this would cause her notice to be an exempt document (s 26(2) of the FOI Act).

### **Request for internal review**

On 29 June 2022, our Office received your application for internal review of Ms Delitt's decision made in accordance with the requirements of s 54B of the FOI Act.

### **Decision summary**

In reviewing our earlier decision, I identified 8 documents which fell within the scope of your request.

To locate the requested documents, our team has searched the Office's electronic records storage system using the information provided in your FOI request. In doing this, we consulted with the Office's PID team to ensure thorough searches of records relating to our PID annual report process.

I am satisfied that this search was appropriate and all documents relevant to your request have been identified where possible.

My decision is to vary the primary decision dated 22 June 2022. My reasons for this decision are outlined below.

### **Material taken into account**

I have taken the following material into account in making my review decision:

- the scope of your FOI request dated 23 May 2022 and your internal review request of 29 June 2022
- the content of the requested documents that fall within the scope of your request
- the FOI Act, particularly ss 47C, 47E(d) and 47F
- the Guidelines issued by the Office of the Australian Information Commissioner under s 93A of the FOI Act (FOI Guidelines)
- relevant case law, in particular the decision of the Australian Information Commissioner in '*YU' and Bureau of Meteorology (Freedom of Information)* [2021] AICmr75 (29 November 2021)
- inter-agency consultation with the APSC.

### **Decision and Reasons**

In your request for internal review, you expressed your disagreement with Ms Delitt's reasons and referred to the Ombudsman's reporting requirements under s 76(2)(a) of the *Public Interest Disclosure Act 2013* (PID Act).

I have reviewed the primary decision, the relevant documents and considered all of the relevant provisions of the FOI Act, to reach an internal review decision pursuant to s 54C of the FOI Act.

As a result of my review, I have reached a decision to:

- grant partial access to one document, with redactions under s 22 of the FOI Act
- grant partial access to one document, with redactions under ss 22 and 47C of the FOI Act as providing access to the deleted matter would be contrary to the public interest
- refuse access to 2 documents under s 47E(d) of the FOI Act as providing access would be contrary to the public interest

- refuse access to 4 documents under ss 47E(d) and 47F of the FOI Act as providing access would be contrary to the public interest.

I have reached this view because of the following reasons:

- I considered the exemption applied in the primary decision (s 37(1)(b) of the FOI Act) was not the most appropriate in the circumstances of 6 documents
- 2 identified documents were appropriate for partial release – with minimal redactions under s 22 of the FOI Act in so far as they contain exempt (s 47C) or irrelevant matter.

My detailed reasons for refusing access to 6 documents, and editing some material within 2 documents, are given below.

A schedule setting out the relevant documents is at **Attachment A**.

### ***Section 22 – Edited copies with exempt or irrelevant material deleted***

I have decided to provide an edited copy of one document under s 22 of the FOI Act. This is identified as Item 7 in **Attachment A**.

Section 22 of the FOI Act allows an agency to prepare an edited copy of a document to delete material which would disclose information *‘that would reasonably be regarded as irrelevant to the request for access’* (s 22(1)(a)(ii)).

Noting the document in question is a draft version of material ultimately published in the Ombudsman’s 2019-20 annual report, I have decided to remove staff name details from any comment box fields which appear in this document.

While I acknowledge and appreciate the FOI Guidelines<sup>1</sup> indicate s 22 of the FOI Act should not be taken as a broad justification to remove the names of government officials, without more nuanced consideration, I nonetheless formed the view that in these particular circumstances the use of s 22 can be appropriately justified.

Of particular significance, the focus of your FOI request is *PID-related information provided by the APSC to the Ombudsman*. As such, I considered that information relating to the identity of government officials who assisted to prepare the Ombudsman’s 2019-20 annual report, where none of these comments relate to APSC PID information, was irrelevant to your request.

### ***Section 47C – Public interest conditional exemption – deliberative processes***

I have decided to provide partial access to one document containing material which, if released, would *‘disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of [an agency]’* (s 47C of the FOI Act).

Noting the draft status of this 2020-21 annual report document – identified as Item 8 in **Attachment A** – I am satisfied it contains matter which is appropriately characterised as being of a deliberative nature. I am also satisfied that the inclusion of this deliberative matter weighs heavily against disclosure of the document in full.

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<sup>1</sup> FOI Guidelines, [3.54].

On this basis, and in reliance on s 22 of the FOI Act, I have decided to provide you with an edited copy to delete the exempt material.

***Section 47E(d) – Public interest conditional exemption – conduct of an agency’s operations***

I have decided to refuse access to 6 documents which contain information the disclosure of which would have a ‘*substantial adverse effect on the proper and efficient conduct of operations of an agency*’ (s 47E(d) of the FOI Act).

I note 4 of these 6 documents also attracted an exemption under s 47F (explained further below).

I formed the view that s 47E(d) applies to 6 documents based on considerations including:

- the real possibility Commonwealth agencies (including the APSC) will become less willing to furnish complete information to this Office when requested to do so as a part of our annual report data collection process, if agencies are aware their individual responses could potentially be released under the FOI Act
- the substantial adverse effect this might have on this Office’s relationships with all Commonwealth agencies as the oversight body for the PID scheme
- the related substantial adverse effect on our capacity to carry out important functions of the Ombudsman under ss 76(1) and (2) of the PID Act
- the APSC’s reasonable expectation that data for agencies handling only a small number of PID matters would ultimately be published in an aggregated form (given the Office’s historical practice of using this approach)
- that the APSC may have acted in reliance of this reasonable expectation in both 2019-20 and 2020-21 when considering whether to exercise the discretion available to agencies under s 76(4) of the PID Act (i.e. to delete information from a document given to the Ombudsman under s 76(3) of the PID Act, in specified circumstances)
- that access could diminish the future flow of information to agencies which only handle small numbers of disclosures – from disclosers, witnesses, staff and other third parties – if these people perceive the confidentiality of their participation in PID processes may be undermined by the release of information under the FOI Act.

Cumulatively, I am satisfied that the considerations listed above weigh heavily against disclosure in the case of 6 documents.

***Section 47F – Public Interest Conditional Exemption – Personal privacy***

Four of the documents we identified contain the names and contact details of former APSC staff.

The identity of the relevant individuals is reasonably ascertainable from the inclusion of their full names and other identifiable details (i.e. email addresses and phone details). I am therefore satisfied that the relevant information constitutes personal information under the definition set out in s 4 of the FOI Act.

Turning now to the question of whether disclosure would be ‘unreasonable’, subsection 47F(2) of the FOI Act requires me to take into account:

- the extent to which the information is well known

- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources
- any other matters that I consider relevant.

The FOI Guidelines set out further information to which decision makers must have regard to when determining whether disclosure would be unreasonable, including<sup>2</sup>:

- the nature, age, and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and
- whether disclosure of the information might advance the public interest in government transparency and integrity.

I ultimately formed the view that s 47F applies to parts of these 4 documents, in conjunction with the s 47E(d) exemption outlined above, based on considerations including:

- the APSC's concern that disclosure of these individuals' personal information under the FOI Act – through publication on a public website – would be unreasonable in the circumstances and likely to interfere with their privacy
- the stress that publication of their names on a public website may cause for the 2 affected former APSC staff members and the likelihood they may oppose publication
- the circumstances of our use and collection of the information (i.e. name and contact details)
- disclosure in this instance would not advance government transparency and integrity
- relatedly, no public purpose would be served through the release of these individuals' personal information.

Cumulatively, I am satisfied that the considerations listed immediately above weigh against disclosure in the case of 4 documents.

### ***Disclosure not in the public interest***

Under s 11A(5) of the FOI Act, I must be satisfied disclosure would be contrary to the public interest before determining that a conditional exemption applies.

For all 7 documents where I considered application of a conditional exemption – whether under s 47C, s 47E(d) or s 47F of the FOI Act – I concluded that the requested material is not required to be disclosed because '*(in the circumstances) access to the document at [this] time would, on balance, be contrary to the public interest*' (s 11A(5)).

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<sup>2</sup> FOI Guidelines, [6.143].

While I considered the non-exhaustive list of factors which would favour access being provided, as set out in s 11A(3) of the FOI Act, I was not satisfied that disclosure of the information contained in these 7 documents would achieve any of the following outcomes:

- promoting the objects of the FOI Act,
- informing debate on a matter of public importance,
- promoting effective oversight of public expenditure, or
- allowing you access to your own personal information.

### ***Your review rights***

If you are dissatisfied with my internal review decision, you may apply to the Office of the Australian Information Commissioner (OAIC) for review.

An application for review by the OAIC must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

- online at [www.oaic.gov.au/about-us/contact-us](http://www.oaic.gov.au/about-us/contact-us)
- via email to [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)
- by mail to GPO Box 5218 Sydney NSW 2001
- in person to Level 3, 175 Pitt Street Sydney NSW 2000

More information about the OAIC review is available on its website. Go to <https://www.oaic.gov.au/freedom-of-information/foi-review-process>

If you have any questions about this letter, you may contact via email at [information.access@ombudsman.gov.au](mailto:information.access@ombudsman.gov.au) or via telephone on 1300 362 072.

Yours sincerely



Polly Porteous  
Director  
Legal Team

*Influencing systemic improvement in public administration*

**ATTACHMENT A: SCHEDULE OF DOCUMENTS (FOI-2022-10056)**

<b>Item No.</b>	<b>Description</b>	<b>Date</b>	<b>Decision and FOI Act provisions (where applicable)</b>
1	PID data submitted by the APSC to the Ombudsman relating to Financial Year 2019-20 (PDF form)	July 2020	Access refused – exempt under ss 47E(d) and 47F
2	Supplementary PID investigations information submitted by the APSC to the Ombudsman relating to Financial Year 2019-20 (Excel doc)	July 2020	Access refused – exempt under s 47E(d)
3	Internal Ombudsman spreadsheet which includes data extracted directly from the document described in Item 1 above (Excel doc)		Access refused – exempt under ss 47E(d) and 47F
4	PID data submitted by the APSC to the Ombudsman relating to Financial Year 2020-21 (PDF form)	July 2021	Access refused – exempt under ss 47E(d) and 47F
5	Supplementary PID investigations information submitted by the APSC to the Ombudsman relating to Financial Year 2020-21 (Excel doc)	July 2021	Access refused – exempt under s 47E(d)
6	Internal Ombudsman spreadsheet which includes data extracted directly from the document described in Item 4 above (Excel doc)		Access refused – exempt under ss 47E(d) and 47F
7	Draft Annual Report Appendix Tables, Financial Year 2019-20 (15 pages)	August 2020	Partial access – edited under s 22
8	Draft Annual Report Appendix Tables, Financial Year 2020-21 (17 pages)	August 2021	Partial access – exempt under s 47C, edited under s 22